



NDSA-22-2021

A Resolution Supporting Amendments to SBHE Policy 503.1

WHEREAS, the North Dakota Student Association (NDSA) represents the voice of North Dakota's 45,000 public college and university students; and,

WHEREAS, the purpose of NDSA is to represent all students enrolled in the North Dakota University System (NDUS) and advocate on issues of higher education in support of access, affordability, quality, and the student experience; and,

WHEREAS, on February 20th, 2021 the NDSA General Assembly (GA) passed NDSA-20-2021: "A Resolution in Opposition to HB 1503 as Written"; and,

WHEREAS, NDSA-20-2021 opposed specific language of HB 1503¹, a bill presented to the North Dakota legislature intended to protect the free speech of North Dakota students; and,

WHEREAS, the GA concluded that aspects of the bill, specifically sections 4(a-c), 5(e), and 5(h), would make the bill more harmful rather than helpful to North Dakota students; and,

WHEREAS, the link to NDSA-20-2021, where the NDSA's concerns are fully outlined, can be found in the footnotes²; and,

WHEREAS, the NDSA has always been an ardent supporter and protector of students' first amendment right to free speech in the North Dakota University System (NDUS); and,

WHEREAS, in response to HB 1503, the NDUS has developed amendments³ to State Board of Higher Education (SBHE) Policy 503.1: "Student Free Speech and Expression" that continue to protect student free speech while addressing and respecting the NDSA's outlined concerns with HB 1503; and,

WHEREAS, the amendments would define student-on-student harassment in a way that would allow NDUS institutions to take preventative action before any harassment has become so severe that a student is denied access to education, while HB 1503 would not allow such preventative action, in addition to protecting all students, not just those students who qualify as part of a protected class; and,

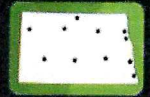
WHEREAS, the amendments would ensure the SBHE and NDUS are in compliance with federal rules that require the protection and fair treatment of organizations who mandate that their organization's leaders and members adhere to the organization's viewpoints and sincerely held beliefs; and,

WHEREAS, the amendments would remove an existing rule that allows institutions to impose security fees on students, faculty, or student organizations who have brought a guest speaker

¹ <https://www.legis.nd.gov/assembly/67-2021/documents/21-0929-03000.pdf>

² <https://ndsa.ndus.edu/wp-content/uploads/sites/5/2021/02/NDSA-20-2021.pdf>

³ https://ndusbpos.sharepoint.com/:b:/s/ndstudentassociation/EeklsqbNQWhMjK55W46G9CQBQ1dlQWslOPPG_n2SH71mpA?e=qbc43N



or event to campus that may incite protest and/or require additional security forces; and,

WHEREAS, the current policy explicitly states that the SBHE “recognizes that students have a fundamental right to free speech and expression under the First Amendment to the United States Constitution and Article I, Section 4 of the North Dakota Constitution, and as a result the SBHE and institutions under its control shall ensure that students have the freedom to speak, write, listen, challenge, learn, and discuss any issue, subject to reasonable and constitutionally-recognized limitations,” and outlines those reasonable and constitutionally-recognized limitations; and,

WHEREAS, the NDUS has not received a formal complaint about student free speech violations in over twelve years, in large part thanks to the continuous monitoring and revising – when deemed necessary – of free speech policies in order to ensure they best protect students; and,

WHEREAS, the NDSA has historically always been consulted on changes to SBHE policy that directly affect student free speech; and,

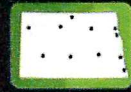
WHEREAS, the NDSA wishes to continue this relationship and provide input on the proposed amendments to SBHE Policy 503.1; so,

THEREFORE, BE IT RESOLVED, that the North Dakota Student Association supports the proposed amendments to SBHE Policy 503.1: Student Free Speech and Expression, both on their own merits and as an alternative to HB 1503; and,

THEREFORE, BE IT FURTHER RESOLVED, that the North Dakota Student Association thanks the North Dakota University System and State Board of Higher Education for their consistent support of North Dakota students and for their continued dedication to ensuring that students are involved in the conversations on policy changes, such as free speech policies and political activities policies, that have a direct and influential impact on students.

Respectfully Submitted

Gracie Lian
President



NDSA-20-2021

A Resolution in Opposition to HB 1503 as Written

WHEREAS, the North Dakota Student Association (NDSA) represents the voice of North Dakota's 45,000 public college and university students; and,

WHEREAS, the purpose of NDSA is to represent all students enrolled in the North Dakota University System (NDUS) and advocate on issues of higher education in support of access, affordability, quality, and the student experience; and,

WHEREAS, the NDSA has a strong history of advocating for students of higher education in North Dakota and their right to free speech on campus and in academic settings; and,

WHEREAS, this historical support has been most recently embodied by NDSA work done in conjunction with the State Board of Higher Education (SBHE) and North Dakota University System (NDUS) over the 2018–2019 and 2019–2020 academic years; and,

WHEREAS, this recent support of free speech can be embodied by the work the NDSA did with the NDUS and SBHE to create SBHE policy 503.3: Student Political Rights¹, a policy that separates student political rights from those of state employees and that ensures specific rights related to student political activities and electioneering would be preserved; and,

WHEREAS, the NDSA also worked closely with the NDUS and SBHE after North Dakota's 19-21 legislative session to develop and implement systemwide and campus-specific free speech policies as directed by that biennium's legislation SB 2320², resulting in SBHE Policy 503.1: Student Free Speech and Expression³; and,

WHEREAS, HB 1503⁴, a bill in relation to the free speech policies of institutions under the control of the State Board of Higher Education, has been introduced to the North Dakota legislature; and,

WHEREAS, this bill amends and reenacts section 15-10.4-02 of North Dakota Century Code; and,

WHEREAS, the NDSA has specific concerns about sections 4(a-c), 5(e), and 5(h), and feels that these sections could be harmful rather than helpful to NDUS students; and,

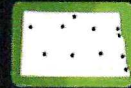
WHEREAS, section 4(a-c) dangerously narrows the definition of student-on-student harassment, restricting the right of an institution to discipline or sanction a student for harassment activity unless "(1) The speech or expression is unwelcome, targets the victim on a basis protected under federal, state, or local law, and is so severe, pervasive, and

¹https://ndusbpos.sharepoint.com/:w:/s/NDUSPoliciesandProcedures/EexdrZtJDtNFrSpeSdjJKoBjBOW_PodGbnfZdtqUVTbxQ

² <https://www.legis.nd.gov/files/resource/66-2019/library/sb2320.pdf>

³<https://ndusbpos.sharepoint.com/:w:/r/sites/NDUSPoliciesandProcedures/Policies/Student%20Free%20Speech%20and%20Expression.docx?d=w8952007f241b46d2a63a362e9c07ca04&csf=1&web=1&e=6Tgx82>

⁴ <https://www.legis.nd.gov/assembly/67-2021/documents/21-0929-03000.pdf>



objectively offensive that a student effectively is denied equal access to educational opportunities or benefits provided by the institution; or (2) The speech or expression explicitly or implicitly conditions a student's participation in an education program or activity or bases an educational decision on the student's submission to unwelcome sexual advances or requests for sexual favors;" and,

WHEREAS, this amendment would prevent universities from taking protective and preventative action in the case of student on student harassment; therefore, a student who is a victim of harassment could not take action until after the harassment has become so severe that their education has been irrevocably impacted, in addition to requiring the victim be considered part of a protective class and thus not protecting all students from harassment; and,

WHEREAS, section 5(e) allows a university to charge student organizations a security fee based on empirical and objective criteria for an event or speaker they have brought to campus in preparation of protests or confrontations; and,

WHEREAS, the NDUS is currently revising its own policies to remove this allowance, prohibiting universities from charging their students and student organizations a security fee for any event or speaker they have brought to campus; and,

WHEREAS, section 5(h) stipulates that an institution may not discriminate against a student organization with respect to a benefit available to any other student organization, such as the allocation of student fees or university funding, based on any discriminatory membership requirements of that organization such as requiring that members adhere to the organization's religious beliefs; and,

WHEREAS, this section comes from a federal ruling⁵ implemented by the Trump Administration; and,

WHEREAS, the NDUS is currently revising its own policies in order to ensure that NDUS institutions are in compliance with this ruling; and,

WHEREAS, cementing this federal ruling into state law would inhibit the ability of the NDUS to efficiently update this policy if a future presidential administration reversed the current ruling unless the ND legislature happened to be in session, which could result in the forfeiture of federal grant money for higher education; and,

WHEREAS, while the NDSA does not have any additional concerns about specific sections of HB 1503, the organization is concerned that this bill relating to the student free speech policies of NDUS institutions was brought to the state legislature without the consultation, knowledge, or input of any students – the main stakeholders of this bill; and,

WHEREAS, the NDSA has been consistently involved in the monitoring and revising of NDUS and SBHE free speech policies through student positions on NDUS councils, the position of the student member of the state board of higher education, and continuous conversations between these governing bodies and our student leaders; so,

⁵ [regulations.gov/document/ED-2019-OPE-0080-0001](https://www.regulations.gov/document/ED-2019-OPE-0080-0001)



THEREFORE, BE IT RESOLVED, barring the specific sections of HB 1503 that were mentioned above, the North Dakota Student Association does not oppose any section of HB 1503 that is already addressed by SBHE and NDUS policies or that is already embedded in state law; and,

BE IT FURTHER RESOLVED, NDSA opposes the version of HB 1503 that includes the policies specified above and urges the state legislature to remove them from HB 1503 while cautioning that the removal of these specific parts of the bill will not signal tacit support by NDSA of HB 1503; and,

BE IT FURTHER RESOLVED, NDSA fully supports and advocates for the right of students and faculty to practice free speech and freedom of expression; and,

BE IT FURTHER RESOLVED, that NDSA thanks the NDUS and SBHE for their continuous support and work to protect and encourage student and faculty free speech while ensuring that students are part of the conversation; and,

BE IT FURTHER RESOLVED, that the NDSA urges caution when implementing highly specific student free speech laws into state statute as it reduces the ability of the NDUS and SBHE to respond to emerging changes in federal rulings related to higher education and free speech in addition to reducing the ability of students to advocate for or against and change the free speech policies that directly affect them.

Approved by the NDSA General Assembly on Saturday, February 20th, 2021.



H.B. 1503

Senate Education Committee

Response to Rebuttal Testimony from Mr. Joe Cohn, Foundation for Individual Rights in Education
Lisa A. Johnson, Vice Chancellor for Academic/Student Affairs, NDUS
701.328.4143 | lisa.a.johnson@ndus.edu

Chairman Schaible and Members of the Senate Education Committee:

Thank you for the opportunity to provide a response to the rebuttal testimony provided by Mr. Cohn and the Foundation for Individual Rights in Education (FIRE). As we noted during our testimony at the Monday, March 22, 2021 hearing, the NDUS has a solid relationship with FIRE, and both the NDUS and its institutions regularly work with its Vice President of Policy Reform, Azhar Majeed, and his staff, at both the system and institution level. As a result, we do not in any way intend to portray FIRE as proceeding in bad faith or from a purely partisan position, and we deeply regret any impression to the contrary.

That said, FIRE is an advocacy organization, and it is entitled to have a preferred policy position. The NDUS's concern regarding FIRE's stated policy positions, particularly with regard to the *Davis* liability standard, is that they have been portrayed not as a preference, but as a constitutional requirement, both in written testimony and Mr. Cohn's spoken testimony to the Committee.

The NDUS's highest concern is for the education, rights, and well-being of its students, and is open to all arguments as to the best way to ensure these goals, including FIRE's. In pursuit of these goals, the NDUS and its institutions are advised by six Assistant Attorneys General who, combined, bring decades of legal experience to their roles. They have wide-ranging backgrounds in business law, contracts, employment law, education law, data privacy and security, criminal prosecution and defense, intellectual property, and constitutional litigation. Each campus also has a highly-trained student affairs staff, including Title IX Coordinators and other Title IX staff. Both attorneys and student affairs staff attend extensive annual training on legal and policy issues affecting students.

As a result, the NDUS deeply regrets that the author of the rebuttal chose to portray the testimony of those who were in opposition to H.B. 1503 as "legally inaccurate" and "false." As NDUS will demonstrate below, the opposite is true.

Because of the length of this response and knowing the tight schedules of the Committee Members, the NDUS will provide the following summary of its response for convenience's sake, and will address each point in detail below.

1. The alleged incidents cited by the rebuttal were not violations of free speech or academic freedom, and in any event did not constitute substantiated free speech complaints upon which the NDUS or institutions could take action.
2. The *Davis* liability standard applies to institutional failure to address student-on-student harassment, and none of the cases the rebuttal supplies apply the *Davis* liability standard to student-on-student harassment policies.
3. There is no constitutional requirement that the *Davis* liability standard be applied to the institutional student-on-student harassment policies under Title VI.
4. The *Davis* liability standard, when combined with the vague language of Sections 4(b) and 4(c), prevents institutions from addressing criminal harassment and other conduct which violates a number of state criminal statutes.
5. The NDUS has never argued that a student must have withdrawn from school to meet the requirements of the *Davis* liability standard, but the *Davis* liability standard requires that students be deprived of equal access to education *before* the NDUS can address the conduct.
6. The NDUS has never charged security fees based on anticipated protest activity, and will never do so, as that part of Policy 503.1 is being rescinded.
7. The existing statute is neither legally nor constitutionally deficient, and is working as intended.

The Committee members should be aware that last Friday and Saturday, the North Dakota Student Association held its March meeting and passed Resolution NDSA-22-2021, which supports the NDUS's proposed revisions to SBHE Policy 503.1. This follows Resolution NDSA-20-2021, which was passed on February 20, 2021 and opposes H.B. 1503 as it is currently written.

In addition, the rebuttal testimony again references a number of institutional policies which allegedly violate the First Amendment. However, the NDUS cannot meaningfully follow up on these allegations, as the NDUS still has not received any information from FIRE regarding their audit (or survey) of institutional policies on student free speech and academic freedom. If NDUS does receive this information, the NDUS and its institution will review those findings and will determine if actions need to be taken.

The NDUS respectfully requests a "do not pass" on H.B. 1503.

1. **There have been no free speech complaints in the NDUS.**

First and foremost, the NDUS's testimony that there have been no substantiated complaints related to free speech violations for at least the last 12 years was accurate. The rebuttal testimony does not contradict that statement. The NDUS generally cannot take action in the absence of a complaint, which, in turn Instead, it takes news reports of one recent campus event (and one older event) which drew media coverage and extrapolates that the institutions violated the free speech rights of the individuals involved. Respectfully, rebuttal testimony confuses publicized incidents with substantiated reports.

First, the rebuttal cites a 2020 incident where NDSU students were alleged to have made racially inflammatory statements in a Snapchat group. The NDUS cannot, and will not, comment on any individual actions taken or not taken with respect to an individual student, as required by the Federal Educational Rights and Privacy Act (20 U.S.C. § 1232g; 24 C.F.R. Part 99). The [Valley News Live article](#) cited by the rebuttal inaccurately paraphrases the quoted NDSU spokesperson, who noted only that the situation was "all addressed within 48 hours." Respectfully, the NDUS refers the Committee to the [Campus Update](#) issued by President Bresciani on December 3, 2020:

I am writing to address hate speech on our campus. It should go without saying that hate speech has no place on NDSU campus, but I am saying it and saying it loudly.

Incidents involving hate speech are antithetical to what we stand for as an educational community. The actions of people who participate in hate speech do not reflect the mission and values of our university nor our community. [. . .]

*Making this issue even more frustrating is that colleges have so few legally permissible tools to react **because federal courts have established that hate speech is protected speech**. However, doing nothing is not an option, so I am establishing a crisis response team for NDSU, which will begin meeting tomorrow to determine what immediate steps can be taken to improve the climate and safety of campus. Membership will be diverse and reflective of all areas of campus.*

We regret that the rebuttal testimony extrapolated from a news story that mischaracterized NDSU's spokesperson's statement to assert that NDSU violated the free speech rights of the students involved.

The rebuttal testimony also asserts that a journalism professor resigned from UND in protest in Spring 2017, asserting that his academic freedom rights had been violated due to UND denying his request to hold seminars on the Standing Rock protests. Again, this assertion, which, to be fair, is based on an inaccurate article, is baseless. First and foremost, Dr. Trahant did not resign during Fall 2017, as the cited article claims. He remained the Charles R. Johnson Endowed Professor of Journalism at UND until May of 2018, when he became editor of Indian Country Today. Contrary to the media reports, Dr. Trahant left UND not out of protest over being denied permission to put on seminars about the Standing Rock Protests, but to go back to engaging in journalism full time.

In 2016, Dr. Trahant sought to focus UND's Hagerty Lecture on the Dakota Access protests in the spring of 2017, but the funding available for the Hagerty Lecture was not sufficient,¹ so the plan was tabled and no Hagerty Lecture took place that year. In October 2017, Dr. Trahant proposed an ambitious three-day lecture series surrounding the Dakota Access protests and social media's role in the same. While there were initial hiccups regarding the scope, funding and speakers for the event – including at least one speaker seeking speaking fees which were above the budget for the event – UND funded, and Dr. Trahant organized, a full-day seminar on April 19, 2018 titled “[Standing Rock & The Media](#),” which included hosting Jenni Monet, an American Indian journalist, to give the Hagerty Lecture. Emails from around the time of both of Dr. Trahant's proposals showed that the UND administration was excited about Dr. Trahant's proposals, but initially failed to identify a funding source and date that would not conflict with other major campus events.

The second publicized case cited in the rebuttal testimony does not support an allegation that UND violated academic freedom.

2. The *Davis* liability standard is a standard of liability, not the required standard for non-Title IX student-on-student harassment policies.

As the NDUS's legal counsel testified at the hearing on H.B. 1503, in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) established a liability standard, not the requirements for all student-on-student harassment policies. Under *Davis*, in order to be held liable for failing to address student-on-student sexual harassment under Title IX of the Education Amendments of 1972, the student must demonstrate that the school was “deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” *Id.* at 650. This is not the requirement for student-on-student harassment policies, but for a court finding a school liable for not enforcing Title IX.²

The cases cited by the rebuttal do not establish otherwise. The primary case cited by the rebuttal, *B.H. ex rel. Hawk v. Easton Area School District*, 725 F.3d 293 (3rd Cir. 2013), does not support the rebuttal's point. This case involved five middle-school students who wore silicone bracelets emblazoned with the emblem “I ♥ Boobies! (KEEP A BREAST)” in support of a breast cancer non-profit. School administrators banned the bracelets district-wide under the School District's dress code policy, and disciplined the students for “disrespect, defiance, and disruption.” *Id.* at 300.

¹ The Hagerty Lecture, which was funded by an endowment from the Grand Forks Herald in honor of their long-time editor, Jack Hagerty, was generally not held every year, due to the interest on the endowment not covering the costs of the event and lack of student interest.

² The NDUS agrees and acknowledges that, as a result of the 2020 Final Rule on Title IX, the *Davis* liability standard *does apply* to student-on-student harassment which is actionable under Title IX. However, that is a regulatory standard, not a constitutional requirement.

The court in *Hawk* halted the bracelet ban for a number of reasons, in the process rejecting the school district's argument that permitting the bracelet ban put them at risk of violating Title IX, citing *Davis*'s "severe and pervasive" standard. *Id.* at 322-323. Again, this is an argument based in the potential liability of the school, and nowhere requires that schools adopt this standard for their own student-on-student harassment policies.

Respectfully, the other cases cited by the rebuttal also do *not* establish *Davis* as the required standard for an institution to discipline all cases of student-on-student harassment, and it is difficult to see how a fair reading could lead to that conclusion.³

The final case cited by the rebuttal, *Meriwether v. Hartop*, which was only decided on March 26, 2021, involved a professor who repeatedly misgendered a transgender student. *See* No. 20-3289, ___ F.3d ___, 2021 WL 1149377 (6th Cir. Mar. 26, 2021). This case did not involve a student-on-student harassment policy (or student-on-student harassment at all), so is irrelevant to the *Davis* discussion.

The NDUS has proposed a definition of student-on-student harassment that clearly follows the guidance from a broad sampling of the caselaw on student-on-student harassment, including many of the cases cited by the rebuttal. The NDUS respectfully submits that the NDUS's testimony did not in any way misrepresent the *Davis* standard.

3. The *Davis* liability standard applies to institutional liability under Title VI, but is not required for student-on-student harassment policies by Title VI.

The rebuttal testimony asserts that the *Davis* liability standard is also mandated for student-on-student harassment policies by Title VI. Respectfully, the cases cited by the rebuttal again only address cases where institutions, school districts, or schools faced potential liability for not intervening to stop student-on-student harassment which qualifies under Title VI.⁴

³ Compare *Davis*, 526 U.S. at 650 (setting liability standard for violating Title IX for failing to address student-on-student harassment, and requiring student-on-student harassment to be severe *and* pervasive) with *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 249 (3rd Cir. 2010) (overturning harassment policy that was so broad that it "could conceivably be applied to cover any speech . . . th[at] offends someone. Absent a showing of severity *or* pervasiveness – that is, a requirement that the conduct objectively and subjectively creates a hostile environment or subjectively interferes with an individual's work – [the policy] provides no shelter for core protected speech." (citation omitted, alteration added)), *DeJohn v. Temple University*, 537 F.3d 301, 320 (3d Cir. 2008) (requiring harassment policy to include a "severe *or* pervasive" requirement in order to avoid suppressing "core protected speech"); and *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (finding that discriminatory harassment policy was void for overbreadth and vagueness – and not discussing the "severe and pervasive" requirement set forth in *Davis*).

⁴ See *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665 n.10 (2d Cir. 2012) (noting that the *Davis* "deliberate indifference" standard applies to lawsuits against public schools for failing to address student-on-student harassment under Title VI); *Bryant v. Indep. Sch. Dist. No. 1-38*, 334 F.3d 928, 934 (10th Cir. 2003) (same); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 n.5 (3d Cir. 2001) (same); *T.E. v. Pine Bush Central School District*, 58 F. Supp. 3d 332, 355-356 (S.D.N.Y. 2014) ("to be covered by Title VI, the harassment must be severe, pervasive, and objectively offensive and discriminatory in effect." (quoting *Zeno*, 702 F.3d at 665) (internal quotations omitted))).

The NDUS regrets the rebuttal's characterization of the NDUS's position regarding Title VI, but it is legally clear that a lower standard applies to Title VI student-on-student harassment policies than does Title IX, thanks to the new Title IX regulations implemented in 2020, which apply the *Davis* standard to Title IX student-on-student harassment policies. There are no equivalent regulations or caselaw which apply that standard to Title VI student-on-student harassment policies.

To be clear, the NDUS agrees with the rebuttal that agency guidance must yield to applicable regulations, court cases, and constitutional provisions. However, as none of these binding sources of authority require the *Davis* standard for Title VI student-on-student harassment policies, the NDUS should follow the guidance issued by the Department of Education's Office for Civil Rights, which adjudicates complaints of Title VI violations.

4. H.B. 1503, as written, arguably prohibits NDUS institutions from acting to stop criminal harassment, menacing, and criminal coercion, along with possibly stalking.

The rebuttal testimony substitutes its own position for NDUS's, asserting that the *Davis* standard does not prevent NDUS institutions from taking action to stop "stalking, domestic violence, or dating violence." The NDUS has never contended that the *Davis* standard barred action against domestic violence or dating violence – while stalking resides in a relative gray area. There are arguments that stalking could be based solely on expressive activity, based on N.D.C.C. § 12.1-17-07.1.

However, NDUS's greatest concern has always been with respect to criminal harassment, criminal coercion, or menacing – and the rebuttal does not address those offenses. These offenses may be based entirely on speech or expressive activity. *See* N.D.C.C. 12.1-17-05, -06, and -07. It may well be that the rebuttal's author views these offenses as unconstitutional. However, system and institution policy on student-on-student harassment is not the right place to litigate the constitutionality of the duly-enacted criminal laws of the state of North Dakota. It seems beyond question that the NDUS must retain the ability to address conduct that the Legislative Assembly has deemed to be criminal under state law.

The rebuttal also asserts that Section 4(b) of the proposed revised statute protects NDUS's ability to address conduct which is not protected by the First Amendment to the Constitution. That is one plausible reading of the section. However, the draft language of Section 4 is vague at best on this point, and NDUS is concerned about relying on conflicting language when it comes to student rights.

Specifically, Section 4 makes clear that the section applies to "discriminatory student-on-student harassment," and Section 4(a) uses the *Davis* liability standard to define "discriminatory student-on-student harassment." Section 4(b) either introduces a new concept (non-discriminatory "student-on-

student harassment”) or simply omits the word “discriminatory” from the phrase. The latter option seems more plausible, as Section 4(b) refers to a “definition” of “student-on-student harassment” – and the only definition present in Section 4 is that of “discriminatory student-on-student harassment” – the *Davis* liability standard. Finally, Section 4(c) refers to “student-on-student speech” and “discriminatory harassment,” without providing any definition of these terms. Either way, Section 4 provides no guidance to the NDUS and its institutions as to how to deal with the differences, if any, between “discriminatory student-on-student harassment,” “discriminatory harassment,” “student-on-student harassment,” and “student-on-student speech,” while ensuring that the NDUS does not violate either the statute or rights protected by the First Amendment and the North Dakota Constitution.

5. The *Davis* liability standard, if applied to all student-on-student harassment, would render NDUS institutions unable to stop or discipline harassment until the victim is denied the benefits of their education.

By definition, the *Davis* liability standard **requires** that institutions may not intervene via the student code of conduct until “a student is effectively denied equal access to educational opportunities or benefits provided by the institution.” The rebuttal has created an attractive straw man, stating that “[t]here have been no courts that have required that a student actually leave school to find remedy under *Davis*.” But that is not at all NDUS’s argument. H.B. 1503, as written, would require that a victim of student-on-student harassment suffer severe effects – so severe as to deny equal access to their education – before the institution can intervene. The NDUS and its institutions need the ability, just like every school in the nation, to intervene through the disciplinary process *before* the harassment reaches that level.

Again, the rebuttal cites to cases where the *Davis* liability standard was used to find that the institution or school acted with deliberate indifference by failing to act to prevent student-on-student harassment. These are just not cases where a student successfully sued for being punished under a student-on-student harassment policy that did not incorporate the elements of the *Davis* liability standard.

Even more, the rebuttal’s compromise that institutions could take nonpunitive measures such as offering supportive measures to a victim of harassment is no compromise at all. First and foremost, these types of supportive measures, which are common in the Title IX space, often involve offering options which are often seen by the subject of harassment as punishing the victim – moving the subject out of their housing, changing the subject’s class schedule, etc. Second, the cases cited by the rebuttal establish that some types of non-punitive measures, including offering educational resources

to the harassers or putting on seminars about diversity and acceptance,⁵ are half-measures which could even be used as evidence to support a finding of deliberate indifference in the event that the victim sues the institution.⁶

6. No NDUS institution has ever charged security fees based on anticipated response to speech, and no NDUS institution will.

The NDUS agrees that the current provision in Policy 503.1 permitting the charging of security fees based on anticipated protest activity fees is unenforceable. All NDUS campuses have been instructed not to impose such fees, and no such fees have *ever* been imposed. The policy is a nullity to the extent that it permits the imposition of such fees, and is being revised. The inquiry should end there.

7. The existing statute has worked as intended, and does not suffer from the deficiencies the rebuttal claims.

In 2019, this Committee and the NDUS worked together to create a statute which would protect the rights of NDUS students and employees, while still providing the NDUS the agility it needs to respond to ever-changing regulations and court decisions. That statute has worked. The NDUS and its institutions implemented policies, on an extremely short timetable, which meet all of the requirements of the statute, and actually implemented a number of the elements of 2019's S.B. 2023 which were not required by the eventual statute. The NDUS went even further, and worked with FIRE and the North Dakota Student Association to implement a policy strongly protecting student political rights in advance of the 2020 elections. The existing statute is working.

However, the rebuttal has identified two areas where it contends that the existing statute is "fatally flawed." This is far from the case.

First, the rebuttal asserts that Paragraph 2 of the existing statute is unconstitutionally overbroad. This is not the case. The existing paragraph requires SBHE and institution policies to "[p]ermit[] institutions to establish and enforce *reasonable and constitutional* time, place, and manner restrictions on free speech, assembly, and expression." (emphasis added). The paragraph has two requirements: reasonability and constitutionality. These two elements permit the SBHE and its institutions to adopt whatever limitations are necessary, so long as those restrictions are reasonable and constitutional. The rebuttal testimony instead reasons that the statute reclassifies all outdoor and indoor spaces as equivalent, and limits all restrictions to only "time, place, and manner" restrictions. The plain language of the statute does not support this argument.

⁵ See *T.E. v. Pine Bush Cent. School Dist.*, 58 F. Supp. 3d 332, 365 (S.D.N.Y. 2014).

⁶ *Id.*

Second, the rebuttal claims that the Legislative Assembly may not defer to the American Association of University Professors to protect academic freedom, and raises several reasons why the rebuttal's author believes this provision is inappropriate. However, the statute does not require that the SBHE and institutions adopt the AAUP's *most recent* guidance. The SBHE, in Policy 401.1, adopted the AAUP's 1940 Statement of Principles on Academic Freedom with its 1970 Interpretive Comments. The SBHE, in fact, has gone even farther to protect faculty rights than that AAUP guidance, providing that "faculty shall not face discipline or adverse employment action based on classroom speech unless such speech violates other institutional policies or procedures." *See* SBHE Policy 401.1(4). Moreover, the SBHE Policy specifically recognizes the applicability of academic freedom to arenas outside the classroom. *See* SBHE Policy 401.1(2).

Based on the last two years of on-the-ground experience, the NDUS has seen the existing statute work. H.B. 1503 is a solution searching for a problem.

Conclusion

The NDUS sincerely appreciates the concern that FIRE has shown for the First Amendment rights of NDUS students and faculty. However, neither the bill sponsors nor FIRE ever sought the input of NDUS students or faculty: the two groups whose rights H.B. 1503 purports to protect, and both groups now oppose the bill. Respectfully, H.B. 1503 remains a solution searching for a problem, and is a solution which will only lead to more problems.

The NDUS respectfully recommends that the Committee issue a "do not pass" recommendation.